Supreme Court, U.S.
FILED
AUG 1997
CLERK

No. 97-131

In The Supreme Court Of The United States

OCTOBER TERM 1997

A-1 APPLIANCE; ALBO APPLIANCE; APPLIANCE WORLD, INC.; BLONDER'S DISCOUNT APPLIANCE CENTER, INC.; CT'S VIDEO AND APPLIANCES; INNERSPACE, INC.; JOHNNIES APPLIANCE; NATASTI'S INC; POMOLIO APPLIANCE; WOODBURY APPLIANCE; YERKES APPLIANCE,
Petitioners,

v.

DEUTSCHE FINANCIAL SERVICES CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For The Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENT'S STATEMENT OF THE CASE

Plaintiff/Appellant/Respondent ITT COMMERCIAL FINANCE CORP. (now known as Deutsche Financial Services Corporation, but referred to in the actions below and in this Brief as "ITT,") presents its own Statement of the Case to supplement, clarify, and rectify any omissions or misimpressions arising from the statement of the case presented by the Petition for Writ of Certiorari filed by Defendants/Appellees/Petitioners A-1 APPLIANCE; ALBO APPLIANCE; APPLIANCE WORLD, INC.; BLONDER'S DISCOUNT APPLIANCE CENTER, INC.; CT'S VIDEO AND APPLIANCES; INNERSPACE, INC.; JOHNNIES APPLIANCE; NATASTI'S INC.; POMOLIO APPLIANCE; WOODBURY APPLIANCE; YERKES APPLIANCE (collectively, "Petitioners").

This case began as a diversity action before the U.S. District Court for the Eastern District of Pennsylvania, where

ITT sought to recover secured property from Defendants/Appellees/Petitioners. The jury returned a verdict favorable to ITT on three of four counts, but found for the Defendants on the defense of "unclean hands." The district court entered judgment for the Defendants, and ITT appealed to the Third Circuit Court of Appeals.

ITT argued on appeal that it was error for the trial judge to instruct the jury on unclean hands, that ITT's objections to numerous analogous defenses had been overruled by the trial court, and that the facts presented at trial could not support a jury finding of unclean hands. On appeal, the United States Court of Appeals for the Third Circuit found that although the district court committed no "plain error" on the issue of jury instructions, the trial testimony failed to establish a case of unclean hands. On page 11 of its Order, the Third Circuit ruled: "Consequently, because there was insufficient evidence to support a finding

of unclean hands, judgment should have been entered in favor of ITT and the case should have proceeded to damages."[1]

Petitioners have filed a Petition for Writ of Certiorari to have this Honorable Court review Third Circuit's ruling. ITT files this Response in opposition to Petitioners' Brief.

RESPONDENT'S ARGUMENT SUMMARY

Review of this cause is unnecessary and inappropriate. Petitioners' jurisdictional reliance on 28 U.S.C. Sec. 1254(1) is misplaced. No direct conflict with other appellate courts has been presented, no important federal question is at issue, and the exercise of this Court's supervisory power is unnecessary. Further, Petitioners fail to raise any coherent constitutional challenge. Finally, the weight of authority,

[1] A copy of the Third Circuit's Opinion was attached to the Petition for Writ of Certiorari.

including the cases cited by Petitioners themselves in the petition, support the proper ruling of the Third Circuit.

ARGUMENT

I. THE PETITION PRESENTS NO CONSIDERATIONS JUSTIFYING REVIEW BY THIS HONORABLE COURT.

This case presents no conflict in appellate courts, no federal question, and no departure from the accepted and usual course of judicial proceedings. Review by certiorari is discretionary, and will be granted only for "compelling reasons." Sup. Ct. R. 10. Petitioners' Brief falls far short of that exacting standard.

Petitioners argue in their Brief that the Third Circuit's ruling "directly conflicts" with other decisions. Review based on a claimed conflict cannot be illusory; it must involve issues of importance to the public, and be "real and embarrassing." *Rice v. Sioux City Memorial Park Cemetery,*

Inc., 349 U.S. 70, 79 (1955). None of these requirements are met by Petitioners' Brief.

Although Petitioners cite several cases, only two are discussed in their Brief: *Bonjorno* v. *Kaiser Alum. & Chem. Corp.*, 752 F.2d 802 (3d Cir. 1984*), cert. den.* 477 U.S. 908 (1986), and *Neely v. EBY Constr. Co.*, 386 U.S. 317 (1967. Neither case supports Petitioners and, in fact, *Neely* especially favors ITT, for reasons explained more fully below.

Bonjorno held merely that a litigant's failure to raise an issue at trial prevents that party from obtaining a later JNOV. 752 F.2d at 814. The instant case, on the other hand, is different. The trial court prevented ITT, on the record, from presenting fully its motion for a directed verdict. This specific issue -- when a party is prevented from explaining fully its position -- was presented for appellate review to the

Third Circuit.[2] The Third Circuit found correctly that since the trial judge prevented ITT from making its full argument, the trial judge was "apparently aware of ITT's position [and] nothing further was required [under Fed.R.Civ.P. 50(a)(2)]." (See Petition for Writ of Certiorari at p. 9a.).

ITT's position is identical to that presented in *Miller v. American President Lines, Ltd.*, 989 F.2d 1450 (6th Cir. 1993), *reh. en banc den.* 1993 U.S. App. Lexis 11413, *cert. den.* 126 U.S. 252 (1993). In *Miller*, the district court summarily overruled a litigant's motions for directed verdict. On appeal, the Sixth Circuit found that the trial judge "apparently considered himself sufficiently apprised of the moving parties' positions," and that therefore, the "particular purpose" of Fed.R.Civ.P. 50(a) had been served. *Id.* at 1465.

[2] ITT briefed this matter to the Third Circuit, with quotations from, and citations to, the trial record, on pages 35-36 of ITT's Initial Brief.

"Apparent awareness" of a party's position therefore satisfies the requirements of Rule 50. A case which *Miller* cited with approval, *Riverview Investments v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990), *cert. den.* 498 U.S. 855 (1990), also supports ITT's position. *Riverview* noted that technical deviations from Rule 50 are "not fatal," because its "slavish application" would be at variance with the rule's spirit. *Id.* at 477.

Neely, the only other case discussed by Petitioners, does not support their argument. *Neely* follows the logic outlined in *Riverview*. In *Neely*, this Court recognized that none of its decisions interpreting Rule 50 mandate an "ironclad rule." 386 U.S. 317 at 326. On the contrary, the Court in *Neely* cited several cases which interpreted Rule 50 flexibly, then commented:

> In view of these cases, the language of Rule 50(d), and the statutory grant of broad appellate jurisdiction, we think a more discriminating

> approach is preferable to the inflexible rule for which the petitioner contends.

Id.

It is evident from the opinion of the Third Circuit that the court exercised its appellate jurisdiction within the spirit of Rule 50(d). The well reasoned opinion of the appellate court indicates the court reviewed the trial transcript and familiarized itself with ITT's position with respect to the Rule 50 motion. Thus, there is no departure from the accepted course of judicial proceedings and this Court should therefore deny the Petition.

II. PETITIONERS SEEKS REVIEW OF FACTUAL MATTERS, WHICH IS INAPPROPRIATE BEFORE THIS COURT.

A petition for writ of certiorari is rarely granted "when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule." Sup. Ct. R. 10. Accordingly, this Court has also long held that it will not grant a writ of certiorari to review evidence and discuss

specific facts. *U.S. v. Johnson*, 268 U.S. 220 (1925); *Hallowell v. U.S.*, 209 U.S. 101 (1908).

Yet, this is exactly what Petitioners seek. The Third Circuit's decision was based on a review of the sufficiency of the trial testimony, relating to the defense of "unclean hands." That Court reviewed the transcript, and found specifically, on page 11 of its Order, that the facts presented at trial did not justify a finding of unclean hands. In the words of the Third Circuit: "We fail to see how evidence of two or three business lunches with the executive director in a twelve-year period constitutes a basis for finding unclean hands." (See Petition for Writ of Certiorari at p. 10a.). The Third Circuit's fact-based decision, premised on the sufficiency of the evidence, was based on a proper, reasoned deliberation, and should not now be disturbed.

CONCLUSION

In conclusion, review of this cause is inappropriate as the Petitioners' Brief presents no considerations justifying review. The reasoned decision of the Third Circuit is aptly supported by established authority. Moreover, the Brief should be denied because Petitioners seek review of factual matters which is inappropriate before this Court.

WHEREFORE, Respondent DEUTSCHE FINANCIAL SERVICES CORPORATION (f/k/a ITT Commercial Finance Corp.) respectfully requests this Honorable Court to deny the instant Petition for Writ of Certiorari.

Respectfully submitted,

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